

No. 85469-6
COA No. 63697-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BRIAN LeROY SIERS,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James E. Rogers

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, Brian Siers, asks this Court to deny the State's petition for review.

B. ISSUES PRESENTED FOR REVIEW

1. Where this Court's decision in *State v. Powell* unequivocally requires the State charge the aggravating circumstance in the information, and the State failed to charge the aggravating circumstance here, was the Court of Appeals decision determining that the remedy was dismissal of the underlying conviction without prejudice to the State's right to refile consistent with this Court's decisions in *Powell*, *Vangerpen*, and *Kjorsvik*?

2. Whether the State has established the decision in *Powell* is harmful and incorrect, necessary prerequisites for this Court to ignore *stare decisis* and revisit *Powell*?

C. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

1. THE DECISION OF THE COURT OF APPEALS CORRECTLY DETERMINED THE REMEDY IN THIS CASE WAS COMPELLED BY THIS COURT'S DECISION IN *STATE v. POWELL*

The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution require a charging document include all essential elements of a crime--statutory and nonstatutory--so as to inform a defendant of the charges against him or her and to allow preparation for the defense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *Leonard v. Territory*, 2 Wash.Terr. 381, 392, 7 P. 872 (1885). "Therefore an accused has a right to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If a charging document does not on its face state an offense, the document is unconstitutional and must be dismissed without prejudice to the State's right to recharge. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

The State contends the remedy applied by the Court of Appeals in this case was not required by this Court's decision in

State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). *Id.* But *Powell* arose not as a challenge to the underlying conviction because of the failure to allege the aggravating factor in the information, but it arose as a challenge to the State's attempt to impanel a jury to find the aggravating factors despite there not being alleged in the information. *Powell*, 167 Wn.2d at 677-81. Thus, the two justice concurrence in *Powell* voted to affirm the process given the unique procedural posture of that case. *Id.* But that remedy applied in the *Powell* decision does not apply in *Siers* because of the unique procedural posture of *Powell* which simply did not reach the question presented here.

The State also mistakenly relies on the decision in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972) for the proposition that the remedy should have been dismissal of the "Good Samaritan" aggravating factor. Pet. for Rev. at 8. But, as the Court of Appeals credibly noted when it rejected this argument:

We are not persuaded by the State's contention that the result in *Frazier* dictates the result in this case. First, *Frazier* was pre-*Blakely*. Second, there is no indication in *Frazier* or its progeny that the court considered or was asked to consider the issues *Siers* raises here – whether omitting the enhancement from the information vitiates the underlying offense as well as the enhanced sentence. Resentencing was the

remedy requested by the appellant. The Court simply gave the appellant the remedy she asked for.

Siers, slip op. at 7 (citation and parenthetical omitted).

Because *Frazier* predated the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 US. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *Frazier* no longer dictates a particular result here.

Finally, the State takes issue with the remedy determined by the Court of Appeals; dismissal of the underlying offense as well as the aggravating factor. Pet. for Rev. at 8-9. The State's argument has changed significantly from the argument before the Court of Appeals. Before the Court of Appeals, the State argued the error was not in the charging language for second degree assault but in the failure to provide notice of the aggravating circumstance. *Siers*, slip op. at 8. Before this Court, the State's alleges the error is not in the information but the trial court's submitting the special verdict form on the aggravating factor to the jury. Pet. for Rev. at 9. The State most likely changed its theory because the Court of Appeals flatly rejected the argument before it as a "distinction without a difference." Slip op. at 8.

Regardless, relying on this Court's decisions in *Vangerpen*, 125 Wn.2d at 793, and *Kjorsvik*, 117 Wn.2d at 105-06, the Court of Appeals concluded that the remedy was dismissal of the underlying offense without prejudice to the State's right to refile it. This conclusion is the logical extension of this Court's decisions in *Powell*, *Vangerpen*, and *Kjorsvik*. The remedy is very simple for the State to institute in the future; charge the aggravating circumstance in the information. This Court should deny review and let the well-reasoned decision of the Court of Appeals stand as consistent with this Court's prior decisions and the decisions of the United States Supreme Court.

2. THE COURT OF APPEALS' DECISION IS
CONSISTENT WITH DECISIONS OF THIS
COURT

The State urges this Court to reexamine its decision in *Powell* because "neither case (*Apprendi* or *Blakely*) stands for the proposition that the Constitution requires that the State allege aggravating circumstances in the charging document." Pet. for Rev. at 12-13. In support of its argument, the State cites only to other state court decisions which found no requirement to allege aggravating circumstances in the information. *Id.*

This Court has consistently held that “[t]he doctrine of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” ’ ’ ” *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006), *quoting Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004), *quoting In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Courts of this State will abrogate the holding of a prior decision only where the party seeking to have the decision overruled has demonstrated that the precedent is both incorrect and harmful. *State v. Kier*, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008).

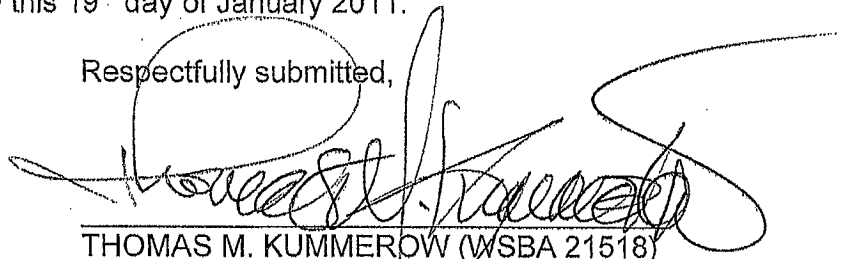
The State has failed to demonstrate why the decision in *Powell* is incorrect and harmful. As stated, the State’s remedy to the decision in *Siers* is simple; include the aggravating circumstance in the information. Had it done so here, there would not have been any error. This Court should leave the decision in *Powell* stand.

D. CONCLUSION

For the reasons stated, Mr. Siers requests this Court deny the State's petition for review .

DATED this 19th day of January 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and contact information.

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 85469-6**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

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State v. Brian Siers No. 85469-6

Please accept the attached documents for filing in the above-subject case:

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